Court of Appeals Case No. 39691-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

PACIFIC TOPSOILS, INC., Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION.

The Department of Ecology ("Ecology") has charged Pacific Topsoils, Inc. ("PTI") with violating the Water Pollution Control Act (WPCA) under a novel theory that placing clean fill dirt on a drained agricultural field alleged to be wetland constitutes discharging pollutants into waters of the state; in doing so, Ecology exceeded its statutory authority. The administrative Orders imposing an $88,000 penalty failed to give constitutionally sufficient notice of the law and facts underlying this action. Ecology's actions have rendered the WPCA void for vagueness as it has been applied in this case. In addition, Ecology failed to prove all the essential elements of the violation at hearing, and the Pollution Control Hearings Board made grave errors of fact and law in affirming the penalty.

II. ASSIGNMENTS OF ERROR.

1. The trial court and Board erred by finding that Ecology has jurisdiction to issue the penalty in this case under the Water Pollution Control Act.

2. The trial court and the Board erred by finding that PTI's constitutional right to due process was not violated by the unconstitutional vagueness of the Water Pollution Control Act as it was applied in this case.

3. The trial court and the Board erred by finding that PTI's right to due process was not violated by Ecology's failure to give it constitutionally sufficient notice of the charges against which it must defend and of the basis for the penalty.

(a) The trial court committed error by entering Finding 1.1 that PTI had adequate notice that Ecology regulates wetlands.
(b) The trial court committed error by entering Finding 1.2 which claimed that Penalty Order gave PTI adequate notice of the violation.

4. The trial court and the Board erred by finding that Ecology had proved the violation of the Water Pollution Control Act.

5. The Board denied appellant a meaningful opportunity to be heard in violation of procedural due process by refusing to allow appellant to make its record and to cross-examine witnesses; it also committed error by granting Ecology's motion to strike PTI's hearing brief because it exceeded 12 pages.

6. The Board violated appellant's constitutional right to due process by using testimony about uninvestigated allegations of other bad acts, with no prior notice to appellant.

7. Findings of Fact No. 2, 3, 6, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 are not supported by substantial evidence and the PCHB mischaracterizes testimony provided at hearing; findings 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 rest on erroneous premises about wetlands and the evaluation of Ecology and Parametrix and Ecology's authority over wetlands.

8. Findings of Fact 7, 8, 9, 10, 11, 27, 28, and 29 and Conclusion No. 15, 19, 20, and 21 address alleged other bad acts, have no bearing on this case, do not demonstrate that PTI had notice that Ecology might impose penalties under

WPCA and were introduced into the record without prior notice in violation of due process.

9. Conclusions No. 1, 3, 7, 9, and 10 rest on erroneous legal premises and Conclusion No. 4, 5, 6, 8, 11, 12, 13, 16, 17, and 18 rest on incorrect technical and legal premises.

10. The trial court erred by refusing to expand the record on review to include documents from the Snohomish County enforcement action showing that PTI had cooperated and settled with the County, while at the same time allowing Ecology to include documents that it alleged showed PTI's supposed recalcitrance.

Issues Pertaining to Assignments of Error.

- Does the Water Pollution Control Act, RCW 90.48.010 et seq., give the Department of Ecology the authority to directly regulate and penalize the discharge of clean fill into wetlands? (Assignment of Error 1)
- Is the Water Pollution Control Act vague as it has been applied in this case because it provides no notice that it regulates wetlands or that Ecology can penalize the filling of wetlands? (Assignment of Error No. 2)
- Did the Administrative Orders that Ecology issued in this case give appellant constitutionally sufficient notice? (Assignment of Error No. 1 and 3)
- Should the Court vacate the penalty in this case under the fair notice doctrine because Ecology's novel interpretation of the Water Pollution Control

Act was not ascertainably certain from the statute text? (Assignment of Error No. 2)

- Did Ecology give sufficient evidence of the essential elements of the alleged violation under the Water Pollution Control Act? (Assignments of Error No. 1 and 4)
- Did the Board impermissibly rely on irrelevant, speculative background information in determining whether a wetland violation occurred? (Assignment of Errors No. 4, 7 ,8 and 9)
- Does the record support the Board's conclusion that Ecology and Parametrix investigations of the area beneath the fill were thorough and their conclusion that wetlands were filled was sound and reliable? (Conclusion No. 4, 5, Findings of Fact No. 19, 21, and No.22). (Assignments of Error No. 7 and 9)
- Did the Board violate due process by considering other alleged bad acts, when Ecology had given no prior notice of the allegations and the Board's arbitrary time limit for PTI's case prevented it meeting the allegations? (Assignments of Error No. 5, 6, 8)
- Was the Snohomish County enforcement action irrelevant, when Ecology used it to justify its claim of appellant's regulatory recalcitrance? See

Findings No. 7, 9, 10, and 11; Conclusions 20 and 21. (Assignments of Error 6 and 8)

- Did the Board and trial court improperly determine that the Snohomish County action and other circumstances provided Pacific Topsoils with notice that Ecology planned to impose penalties under the Water Pollution Control Act and constituted compliance with the notice requirements of RCW 90.48.120? See Findings No. 7, 9, 10 and 11, Conclusion 27. (Assignment of Error No. 8)

- Did the Board properly conclude that the Parametrix preliminary study and Ecology's cursory examination of wetlands complied with delineation regulations and established that twelve acres of wetland had been filled? (Assignments of Error No. 7 and 9)

- Did substantial evidence support the Board's other findings? (Assignments of Error No. 8 and 9)

- Were the Board's conclusions of law and mixed questions of law and fact correct? (Assignments of Error 7 and 9)

- Should the trial court have allowed appellant to expand the record on review to show that it had cooperated with Snohomish County and agreed to pay a large fine and remove the fill, when one of Ecology's arguments for a new penalty for the same act was that PTI was recalcitrant? (Assignment of Error No. 10)

III. STATEMENT OF THE CASE.

Pacific Topsoils, Inc. ("PTI" or "Pacific Topsoils") appeals two administrative orders (collectively "Penalty Orders") and an $88,000 fine from the Washington State Department of Ecology, ("Ecology"), charging it with polluting waters of the state under RCW 90.48.080 by placing a stockpile of fill on an alleged wetland without obtaining a National Pollution Discharge Elimination System ("NPDES") permit. ADR 40-43: Appendix ("Appx.") 1.

PTI owns former agricultural and industrial land on Smith Island, in Snohomish County. The parcel subject to this penalty action ("the field") is zoned for industrial use and was used by Weyerhaeuser as a mill. ADR 899. Before that, the field had been farmed for many decades. The field is in a floodplain and is classified under the Snohomish County Code as "shoreland," requiring a grading permit for earthwork and a Shoreline Management Act ("SMA") permit. RP 57-59; 79.

The field is adjacent to another parcel owned by PTI, a former Weyerhaeuser wood waste dump. PTI has an approved plan to remediate this site under the Model Toxics Control Act (MTCA) and reclaim the land for a beneficial purpose, an environmental improvement. RP 503; 506; Appx. 21 *See* RCW 70.105D.010. In order to finish this reclamation project, PTI moved a stockpile of clean fill to the field that would then be used to cap the MTCA site next door. RP506. The fill stockpile was not placed as a permanent fixture. RP 506; Appx. 21.

Over the last hundred years at least, the property has been diked. It has been drained with ceramic tiles and ditches. Levees and flood tidegates have also been installed which protect the property absolutely from any tidal inundation or influence. RP 353; 354; ADR 2821; ADR 899. As discussed below, Ecology has all but ignored the invasive water control features which have redefined Smith Island's hydrologic regime over the last century. RP 295; RP 354.

Properties belonging to Cedar Grove, Inc. and Norwest Concrete, with PTI's field, once all formed a single agricultural field. RP 57; 59; 76; ADR 899. Wetland delineations done during the growing season on these adjacent parcels by GeoEngineering found that of Cedar Grove's 158 acres, only 12 acres were wetland and of Norwest's 25 acres, less than one acre was wetland. RP 81-82; ADR 2828-2831; 2966. Ecology has assumed that the entire 37 acres of PTI's property is wetland. However, until Dr. James Kelley conducted one at PTI's request, no wetlands delineation had ever been conducted on PTI's field during the early growing season; it is crucial to do studies then on sites with complex hydrology. RP 363-373; 407; Appx.19.

This enforcement action arose when Cedar Grove, PTI's main market competitor in commercial composting, reported to Snohomish County that PTI had placed fill stockpiles on its land. RP 57; 69; 76. The County notified PTI that it had illegally filled without a grading permit. *Id.* PTI immediately signed a Voluntary Correction Agreement and, with the help of consulting firm

Parametrix, Inc., began preparing the necessary documents to apply retroactively for the grading permit, without which it could not lawfully remove the stockpiles of fill. RP 101; 105, 141. Eventually Cedar Grove alleged that the fill had been placed on wetlands and engaged a flyover crew to take aerial photographs. Cedar Grove's consultant, Mark Wolken, provided those photographs and some old documents to the Everett Shoreline Coalition which in turn complained to Ecology. RP 57-59;79; 63.

Snohomish County issued a penalty order to Pacific Topsoils for placing the stockpile of fill on the field without obtaining a grading permit, and also claimed that PTI had filled a wetland. The County's hearing examiner *pro tem* considered the same evidence as was presented to the Pollution Control Hearings Board in this case and declined to find that wetlands had been filled. ADR 1746; Appx.7.[1] However, the Hearing Examiner did find that PTI had needed a grading permit in order to place the fill where it did. *Id.* Eventually PTI and the County reached a settlement in which PTI was allowed to start moving the stockpile of fill onto the MTCA site for which it had always been destined, without waiting for the grading permit. PTI also agreed to pay a hefty fine of $37,000. RP 105; CP 328-333; Appx.8.

While the Snohomish County enforcement action was still pending, and while PTI was prohibited from moving the fill because it did not have a county

[1] The Hearing Examiner, Earl Crandall, is a former member of the Shoreline Hearings Board and former longtime Seattle City Attorney and has extensive experience dealing with wetlands issues.

grading permit and was subject to a county stop work order, Ecology began its own enforcement action. On October 27, 2006, Ecology official Paul Anderson visited the site and orally requested a wetlands delineation. RP 597. He was informed that PTI was in the process of performing the necessary studies and that when a delineation was completed it would be forwarded to Ecology.[2] Before that delineation could be completed in the early growing season, Ecology issued two administrative Order No. 4095 and Order No. 4096 (collectively, "Penalty Order") ADR 41-3; Appx. 1 claiming that PTI had placed fill on a wetland without a permit, alleging that it needed an NPDES permit for its action, and imposing an $88,000 fine on PTI for allegedly violating the Water Pollution Control Act, RCW 90.48.080.

The Penalty Order referred to RCW 90.48.160, which covers National Pollutant Discharge Elimination System ("NPDES") permits.[3] Ecology did not state any facts connecting placement of fill in a field with contaminating or polluting a water of the state, nor did it recite any facts as to why PTI needed an NPDES permit. *Id.* The Penalty Order did not mention any need for a permit from the United States Army Corps of Engineers under Section 404 of the federal Clean Water Act. The Penalty Order did not state what factors or calculation had been used in setting the amount of the $88,000 penalty. *Id.*

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[2] *See* Section IV(D), *infra*, for more detail on Anderson's site visit and the studies PTI performed.

[3] The NPDES is a federal permitting system which the states administer, and the WPCA designates Ecology as the regulatory agency for NPDES. *See* RCW 90.48.160.

PTI appealed the Penalty Order to the Pollution Control Hearings Board ("PCHB" or "Board"). At the hearing, Ecology abandoned the claim that PTI had needed an NPDES permit and alleged for the first time that PTI needed, but had failed to obtain, a 404 permit from the Corps, which authorizes filling a wetland with clean fill.[4] Ecology presented no evidence relating to any need for an NPDES permit at the hearing; instead, it focused on the lack of a 404 permit. Ecology produced no witness from the Corps. The only witness Ecology produced to testify that PTI's filling activity fell under Section 404 was Mark Wolken, the Cedar Grove, Inc. consultant. RP 75.

Ecology presented two of its officials, Paul Anderson and Eric Stockdale of the Shoreland and Environmental Assistance division. It had no expert witnesses who had conducted studies or a delineation to testify as to whether there were wetlands under the fill. There was no testimony as to how "waters of the state" had been "polluted" by the fill. Ecology's case relied largely on Anderson's 30-minute site visit, in which he walked around the soggy southwest corner of the property where no stockpiles had been placed, and where he had found neither wetland hydrology nor wetland vegetation. RP 244.[5] Notes of

[4] "404 permit" is the commonly used term for a federal permit under section 404 of the federal Clean Water Act, 33 U.S.C. § 1344, a permitting scheme administered by the United States Army Corps of Engineers. Under the federal Clean Water Act, not all wetlands are subject to federal jurisdiction. Only wetlands that are within certain relationships to "navigable waters" fall under regulation by the Army Corps of Engineers. *See, e.g., Solid Waste Agency of Northern Cook Cy. v. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001).

[5] For the Snohomish County hearing in July 2007, Anderson had prepared a report which indicated that he had neither found wetland or hydrology nor wetland vegetation on the site on his October 2007 site visit. ADR 305; Appx.5.

Ecology employee Talent from a meeting with 13 regulators state that Paul Anderson solely found wetland soils on his October 27, 2006 site visit. ADR 410: Appx. 6. Anderson relied partly on soils maps and hydrological maps – the types of documents that Ecology's own manual designates as background material and dismisses as not sufficiently reliable for delineating the boundaries of actual wetlands. *Washington State Wetland Identification and Delineation Manual, Department of Ecology*, Publication #96-94 (hereinafter *WDM*), at 36-40. Ecology also relied upon a preliminary study from Parametrix, Inc. It was performed during abnormally wet conditions outside of the growing season for the purposes of obtaining the Snohomish County grading permit. It specifically stated that Parametrix had not done any study of the land under the stockpile, and Parametrix had warned in several separate communications that its conclusions were not reliable enough for dealing with regulatory agencies. RP 133-137; ADR 2713; 567; 563; 2719 Appx. 9.

At the hearing, Ecology also alleged for the first time that PTI was a "repeat violator" that should be punished more severely because of unrelated environmental violations on other sites. RP 193-199; 559-560; 565-567; 221-225. This was a surprise because Ecology notes from a meeting with 13 regulators stated that PTI could not be treated as a repeat violator. *See* ADR 416; Appx. 6. Although counsel objected continuously that PTI had been given no notice of this "repeat violator" claim or of the allegations of other wrongdoing that Ecology's witnesses brought forth at the hearing, the Board

allowed the testimony.[6] Because it had no prior notice of the unrelated allegations, PTI's counsel was not prepared at the hearing to bring any testimony to rebut the claims. In any event, the Board had placed an arbitrary limit on the amount of time that PTI had for the testimony of its witnesses, and that time had already expired when Ecology brought forth the allegations of the other alleged violations. RP 564-570; ADR 1199-1202.

The Board upheld the Notice of Penalty, finding that PTI had unlawfully filled a wetland because it had not obtained a permit from the United States Army Corps of Engineers to authorize wetland filling. ADR 1228. [Finding No. 29]. The PCHB ignored the question whether the WPCA gives Ecology authority to regulate wetland filling through a permit system. It simply found that Pacific Topsoils had improperly failed to obtain a permit from the United States Army Corps of Engineers. ADR 1228. [Finding No. 29]. In its decision, the PCHB did not impugn the reliability or authoritativeness of Dr. Kelley's and Mr. Sondergaard's testimony and studies; it simply ignored them. The Board findings and decision completely ignored the claim in the Penalty Order that the violation was PTI's failure to obtain an NPDES waste discharge permit, and ignored the fact that the Penalty Order did not allege a failure to obtain a 404 permit from the Corps. Conclusion No. 5 vaguely alleged that PTI did not

[6] PTI owns a peat mine at Thomas Lake which has nonconforming mining rights. Because peat mining includes the removal of wetland, there have been numerous controversies with regulatory agencies about this property. All of the alleged violations are related to that site. PTI has a green business; it takes millions of tons of yardwaste out of the waste stream each year and makes useful garden products. ADR 899.

obtain a permit from Ecology, but failed to specify what permit that might be. ADR 1232.

IV. ARGUMENT.

A. Standard of Review.

The Administrative Procedure Act, RCW 34.05.001 *et seq.*, governs appellate review of Pollution Control Hearings Board decisions. *Postema v. Pollution Control Hearings Board,* 142 Wn.2d 68, 76-77, 11 P.3d 726 (2000). Under the error of law standard, this Court reviews the Board's legal conclusions *de novo*. *City of Union Gap v. Dept. of Ecology*, 148 Wn.App. 519, 525, 195 P.3d 580 (2008). This Court sits "in the same position as the superior court" and reviews the Board decision, ignoring trial court findings. *Willowbrook Farms LLP v. Dept. of Ecology*, 116 Wn. App. 392, 396-97, 66 P.3d 664 (2003).

Any application of the law to the facts constitutes a mixed question of law and fact, which this Court reviews *de novo*. *Tapper v. Employment Security Dept.*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993). The Court reviews the agency's pure findings of fact for substantial evidence in the record. *Union Gap,* 148 Wn.App. at 526. A pure finding of fact "is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any

assertion as to its legal effect." *Leschi Improvement Council v. Washington State Highway Comm'n,* 84 Wn.2d 271, 283, 525 P.2d 774 (1974). [7]

B. Ecology lacks statutory authority to issue penalties for filling wetlands.

The Board had no jurisdiction to hear this case because Ecology did not have the authority to issue the Penalty Order in the first place. As an administrative agency, Ecology has no inherent authority, but only that explicitly delegated by statute. *State ex rel. Public Disclosure Comm'n v. Raines,* 87 Wn.2d 626, 555 P.2d 1368 (1976). "It is well settled that agency rules and regulations cannot amend or change legislative enactments." *Id.* at 631. The legislature has not authorized Ecology to issue permits relating to wetlands or to penalize filling a wetland, nor has it given the authority to penalize the failure to obtain permits that must be issued by some other agency.

The agency given the authority to issue or deny a permit is the agency that has the authority to punish for failure to obtain that permit. *Herrington v. City of Pearl, Miss.*, 908 F.Supp. 418 (S.D. Miss. 1995)("Generally, the power of licensing a business, activity or thing is power to regulate it, at least to the extent

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[7] Under the "substantial evidence" standard, an agency finding of fact will be upheld if supported by evidence that is substantial when viewed in light of the whole record before the court. . . substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Alpha Kappa Lambda Fraternity v. Washington State University,* 152 Wn.App. 401, 417-18, 216 P.3d 451 (2009)(internal quotes and citations omitted).

of prohibiting under penalty the doing of it without a license.").[8] Any regulatory action beyond statutory bounds, regardless of its practical necessity, is invalid. *Washington Independent Telephone Ass'n v. Telecommunications Rate Payers Ass'n.*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994).

1. Ecology has no authority to enforce Section 404 of the federal Clean Water Act. .

The United States Army Corps of Engineers ("Corps") is the agency given statutory authority to enforce section 404 of the federal Clean Water Act and issue permits for wetland filling. *See* 33 U.S.C. § 1344. Ecology convened a meeting of thirteen regulators to discuss PTI and, at that meeting, urged the Corps to bring a penalty action against PTI. The Corps investigated the site and took no action against PTI. ADR 416; 420; App. 15. As Ecology has no authority to issue or deny a Section 404 permit, it is not the proper agency to bring an enforcement action for the lack of the permit. *See Herrington,* 908 F. Supp., *418*. ADR 1871, Appx. 28 at 4.

2. Ecology is not the agency given authority to impose penalties for wetland filling under state law.

The legislature has circumscribed Ecology's authority over wetlands severely, giving authority to enact and enforce wetlands regulations to the local jurisdictions under the Shoreline Management Act (SMA), RCW 90.58, and the Growth Management Act (GMA), RCW 36.70A.

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[8] *See also Cohen v. Board of Supervisors*, 40 Cal.3d 277, 219 Cal. Rptr. 467, 707 P.2d 840 (1985); *Perry v. Hogarth*, 261 Mich. 526, 246 N.W. 214 (1933); *Chilvers v. People*, 11 Mich. 43, 1862 WL 1127 (1862); *Mathison v. Brister*, 166 Miss. 67, 145 S. 358 (1933).

> Local government shall have the primary responsibility for initiating the planning required by this chapter and administering the regulatory program consistent with the policy and provisions of this chapter. ***The department shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government*** and on insuring compliance with the policy and provisions of this chapter.

RCW 90.58.050 (emphasis added).[9] The SMA specifically calls out wetlands, such as the alleged wetland areas involved in this case, associated with rivers, lakes, streams, and Puget Sound as "shorelands" and brings them under its auspices. RCW 90.58.030(f). The GMA defines wetlands as critical areas and provides that "[e]ach county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170." RCW 36.70A.060(2); RCW 36.70A.030. By the statutes' terms, Ecology has no independent wetlands enforcement authority under the GMA or SMA.

3. WPCA gives Ecology no authority over wetlands.

Clearly, the case at bar presents a new regulatory theory upon which Ecology is only now embarking, with PTI as its test case. The comprehensive state-level wetlands regulation system adopted and enforced by the local jurisdictions under the SMA and GMA explains why Erik Stockdale, in almost two decades dealing with wetlands questions with the Department of Ecology, has never before been involved with a direct wetlands enforcement under the WPCA. RP 588; ADR 566, 673. Indeed, Ecology could produce no showing

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that it had ever, in 36 years since the WPCA was enacted, taken an action like this case.

The Penalty Order charged PTI with violating this provision:

> It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

RCW 90.48.080. Ecology reasoned that "waters of this state" included wetlands, although the statutory definition does not mention wetlands:

> Wherever the words "waters of the state" shall be used in this chapter, they shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.

RCW 90.48.020.[10] In its definition of "waters of the state", the legislature specified what resources were to be included in that definition: lakes, rivers, ponds, streams, inland waters, underground waters, salt waters, surface waters, and watercourses. All of these listed aquatic resources are distinct from the land that borders them. None of these aquatic resources include wetlands. Even

[10] When the word "shall" is used in a statute, the legislature is making a specific command. *Waste Management of Seattle, Inc., v. Utilities and Transportation Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994) ("The use of the word 'shall' [in a statute] imposes a mandatory duty."). Here, in stating that the term "waters of the state" "shall be construed" in a particular way, the legislature restricted the discretion of those enforcing the statute as to how the term should be understood. The presence of "shall be construed" in the statute thus means that what follows that phrase *constitutes the outer limits* of the judiciary's and the executive's creativity in defining the term "waters of the state". Otherwise, the language "shall be construed" would be rendered superfluous.

though the Legislature amended the WPCA in 1955, 1967, 1969, 1970, 1987, 1992, 1995, and 2002, it does not mention wetlands even once.

The WPCA contains an express grant of authority to Ecology: "[t]he department [of Ecology] shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, water courses and underground water." RCW 90.48.030. This specific grant of authority does not mention wetlands, nor does it include the term "all other surface waters and watercourses" which is found in the statute's definition of "waters of the state".

In an obvious effort to expand its regulatory authority, Ecology has enacted a secondary regulatory definition of "surface waters of the state" and added the term "wetlands" to the list provided by the Legislature:

> "Surface waters of the state" includes lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington.

WAC 173-201A-020.[11] By defining the term "surface waters" to include wetlands, Ecology attempts to import wetland regulation into the WPCA, ignoring the numerous statutes in which the Legislature has defined wetlands as ***land***, not as water, and ignoring the Surface Water Code in which the Legislature has made it clear that surface water means water collected in a distinct and usable body

[11] Ecology did not cite this regulation in the Penalty Orders it issued to PTI.

The Court should not allow this unjustified expansion of Ecology's authority under the WPCA. An agency's determination of the scope of its own statutory authority is entitled to no deference whatsoever by the courts. *Telephone Ass'n*, 75 Wn.App. at 363.

> If there is any manner of statutory construction in which the judiciary should not defer to an administrative agency, it is in defining the parameters of the agency's authority under the statute. The agency should not be the arbiter of its own jurisdictional limits.

California Rural Legal Assistance, Inc. v. Legal Services Corp., 937 F.2d 465 (9th Cir. 1991)(Farris, J., concurring). An agency cannot expand its own authority by enacting a regulation that exceeds the authority contained in its enabling statute. *Rettkowski v Department of Ecology*, 128 Wn.2d 508, 910 P.2d 462 (1995); *Raines*, 87 Wn.2d at 631. In order to accept Ecology's interpretation of the Water Pollution Control Act to include the authority to penalize placing a stockpile of dirt on an agricultural field, this Court would have to ignore the unambiguous text of other environmental statutes that form Title 90 and of the WPCA itself.

Ecology cannot legitimately bring wetlands into the domain of the WPCA merely by redefining wetlands as "surface waters" because the Legislature has already spoken clearly: wetlands are land, not water. In its statutory scheme for protecting water resources in RCW Title 90, the Legislature consistently makes a clear distinction between land and water, and has repeatedly defined wetlands as land, not as watercourses. The Legislature has defined "wetlands" in many

environmental protection statutes, such as the Growth Management Act, the Shoreline Management Act, and the Reclaimed Water Use Statute:

> "Wetland" or "wetlands" means **areas that are inundated or saturated by surface water or groundwater** at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in **saturated soil conditions**. Wetlands generally include swamps, marshes, bogs, and similar areas.

RCW 36.70A.030(21)(emphasis added); *see also* RCW 90.58.030; RCW 90.46.010(21).[12] The Shoreline Management Act defines wetlands adjacent to bodies of water as "shorelands":

> "Shorelands" or "shoreland areas" means ***those lands*** extending **landward** for two hundred feet in all directions ... floodways and contiguous floodplain areas landward two hundred feet from such floodways; and ***all wetlands*** and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter...

RCW 90.58.030(f)(emphasis added). The SMA differentiates between lands under its purview, which are called "shorelands," and waters, which are called "waters", "water areas", or "shorelines". RCW 90.58.030. PTI's 37-acre parcel at issue here is adjacent to a slough (tidal water) and is part of a floodplain and, as such, is classified as a "shoreland" under the SMA and Snohomish County's shoreline regulations – even if Ecology were correct in its assertion that the parcel is wetland. RCW 90.58.030. Here, Ecology's action causes this single area to be at once, water under WPCA (RCW 90.48.030) and land under SMA

[12] Waters of the state, as defined in various statutory schemes in RCW Title 90, do not contain soils. Waters of the state such as "rivers and lakes" do not have terrestrial vegetation and saturated soil conditions. The Water Code specifies that the right to water attaches to land. *See* RCW 90.03.380. It is not assumed that these land areas are "surface waters" or "water courses."

(RCW 90.58.030). It is doubtful that the legislature intended such inconsistency within Title 90. There is no hint in the text of the statute that the Legislature intended for Ecology to redefine "surface water" in a manner which diverges from how water and land areas are treated in other statutes. Under the Surface Water Code, water is a commodity controlled by the state and belonging to the people. RCW 90.03.010. Members of the public can obtain the right to use surface waters for domestic, manufacturing and agricultural purposes by making application to the state. *Id.* Surface waters are sufficiently abundant to measured and allocated according to the cubic feet of water per second of time. RCW 90.03.020. The surface water code provides that "it is the policy of the state to promote the use of public waters for ***beneficial purposes***". RCW 90.03.004 (emphasis added). Wetlands, by contrast, have soils which are "inundated or saturated by surface or ground water." RCW 90.46.010(2). Unlike the surface waters described in the Surface Water Code, users cannot extract water from wetland soils and use the water beneficially for irrigation, domestic needs, or manufacturing needs. In contrast to waters described in the Surface Water Code and in the Ground Water Code at Chapter 90.44 RCW, wetland areas do not belong to members of the public and cannot be used by members of the public as a public water source. PTI's agricultural field has been used by cows eating pasture grasses for many years, is dry, and could not serve as a public water source. ADR 899; RP 505. Ecology's definition of wetlands as "surface waters" nullifies the statutory language because it leads to

a logical absurdity. In applying a statute, courts must give all the language in a statute effect if possible. *Whatcom Cy. v. City of Bellingham,* 128 Wn.2d 537, 909 P.2d 1303 (1996). Moreover, they must be mindful of the overall statutory scheme:

> When construing two statutes pertaining to the same subject matter we assume that the legislature does not intend to create an inconsistency. ... Statutes are to be read together, whenever possible, to achieve a "harmonious total statutory scheme ... which maintains the integrity of the respective statutes." [13]

Ecology's rule defining "surface waters" to include wetlands demands that crucial phrases be ignored in statutory definitions of the term "wetlands". For example, such phrases as "inundated or saturated by surface water or ground water" and "support a prevalence of vegetation typically adapted for life in saturated soil conditions" are meaningless if wetlands are surface water.[14] In addition, Ecology's definition of "surface waters" leads to logical absurdity. "Surface water" cannot be inundated or saturated by other water. "Surface water" cannot have saturated soil conditions supporting vegetation that grows in dirt. Ecology's position renders the statutory definitions meaningless.

Penalty provisions must be strictly construed against the state. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986); *Uhl Estate*

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[13] *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 245-46, 88 P.3d 375 (2004), *quoting State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transportation*,142 Wn.2d 328, 342, 12 P.3d 134 (2000); *see also Bell v. Muller*, 129 Wn. App. 177, 188, 118 P.3d 405 (2005).

[14] Moreover, Ecology's definition of "surface waters" to include wetlands conflicts with Ecology's own wetlands definition in WAC 173-22-030.

Co. v. Commissioner of Internal Revenue, 116 F.2d 403, 405 (9th Cir. 1940)(civil penalty statutes, including notice requirements, must be strictly construed).[15] This fine is penal in nature because it is based on the seriousness of the violation and other non-restitution factors. *Tull v. United States Army Corps of Engineers*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

The PCHB in Conclusions 10-11 erroneously concluded that *Kariah Enterprises, LLC v. Ecology*, PCHB 05-021 established that Ecology has the authority to impose penalties for wetland filling under the WPCA; *Kariah* involved Ecology's performance of functions the WPCA actually delegated it authority to perform: Section 401 certification for Section 404 Army Corps federal filling permits. *See* RCW 90.48.530; ADR 1234-35; Appx. 2. It has no bearing on Ecology's authority to issue penalties in this case.

4. No other law authorizes this enforcement action.

The Washington State Legislature has given Ecology some limited jurisdiction to perform discrete duties with respect to wetlands regulation: (1) to administer wetland mitigation banking, RCW 90.74; (2) to administer the aquatic resource mitigation statute, RCW 90.84; and (3) water quality certification under Section 401 of the federal Clean Water Act, *see* RCW 90.48.260. Each time the legislature has given Ecology any authority over

[15] *See also State v. Enloe,* 47 Wn.App. 165, 171, 734 P.2d 520 (1987); *State v. Dear,* 96 Wn.2d 652, 657, 638 P.2d 85 (1981); *Brown v. Kildea,* 58 Wn. 184, 108 P. 452 (1910).

wetlands, it has carefully limited Ecology's role. *See, e.g.*, RCW 90.84.020 [16]; RCW 90.74.005(3).

Ecology has been delegated limited specific duties with respect to wetlands under the federal Clean Water Act to fulfill the state's role. RCW 90.48.260. Ecology's only responsibility there is to certify to the Corps of Engineers that any proposed discharge of dredge or fill material into the waters of the United States complies with federal law. Until application is made to the Corps for a 404 permit, Ecology has no authority under Section 401. ADR 1871; Appx. 28 at 4.

Finally, Ecology's general enabling statute does not vest it with any authority to regulate wetlands or to impose penalties for wetlands filling. *See* RCW 43.21A.005 *et seq*. The absence of a specific grant of authority to Ecology to address wetlands under the WPCA, coupled with an explicit grant of limited Ecology authority to deal with wetlands in some contexts, and with an explicit grant of broad, open-ended authority to local government to regulate wetlands, shows that Ecology acted *ultra vires* in this case. The Board seems to have implicitly agreed that Ecology has no independent authority to regulate wetlands; in its decision, it relied solely on the reasoning that PTI obtained no

[16] RCW 90.84.020 states: "This chapter does not create any new authority for regulating wetlands or wetlands banks beyond what is specifically provided for in this chapter. No authority is granted to the department under this chapter to adopt rules or guidance that apply to wetland projects other than banks under this chapter." RCW 90.84.020. The provision also significantly limits the authority of Ecology to adopt rules pertaining to wetlands and states that "[n]o authority is granted to the Department under this chapter to adopt rules or guidance that apply to wetland projects other than banks". *Id.*

404 permit from the U.S. Army Corps of Engineers. ADR 1228; Finding 29; ADR 1228.

C. The Violation Order failed to give constitutionally sufficient notice of the factual basis and legal authority for the penalty.

The Notice of Penalty failed to provide constitutionally sufficient notice of the allegations of wrongdoing, the statutory and regulatory authority justifying the penalty, and the burden of proof that Ecology would have to meet at the hearing in order to prevail. The United States Constitution protects against deprivation of "life, liberty, or property, without due process of law". U.S. Const. Am. XIV. A civil fine for wetland filling is punitive and constitutes a deprivation of property that requires due process. *Tull,* 481 U.S. at 424.

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas and Water Division v. Craft*, 436 US 1, 11, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) "Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Misleading notice violates due process. *Barrie v. Kitsap County,* 84 Wn.2d 579, 586, 527 P.2d 1377 (1975). In *Mansour v. King Cy.*, 131 Wn.App. 255, 271, 128 P.3d 1241 (2006), the Court of Appeals held that a notice of violation, administratively charging Mansour with harboring a vicious

dog, failed to give constitutionally sufficient notice where, as in the case at bar, it merely gave the general basis of the action:

> [j]ust because Mansour knew the County could remove Maxine if she bit or attacked a domestic animal does not mean he had adequate notice of what the County had to prove in order to remove her. A fundamental tenet of due process is notice of the charges or claims against which one must defend. ...
>
> [Mansour] was entitled to know ahead of time exactly what the County needed to prove at the Board hearing. If in fact it could not prove that Maxine violated a code provision that supported the removal order, he was entitled to know that in time to move for dismissal at the Board level.

Mansour, 131 Wn.App. at 270-72. The Court found that mere references to provisions of the county code were insufficient to provide meaningful notice. *Id.* at 271. Moreover, specific notice of the facts that are alleged to have violated the code must be given ***in the official document charging the violation***. *Seattle v. Jordan*, 134 Wn. 30, 235 P. 6 (1925)[17] Due process is critical in administrative proceedings where "there is little solace to be found in the availability of judicial review which is high on deference but low on the correction of errors." 131 Wn.App. at 267.

By leaving the wording of the Penalty Order vague as to what constituted the violation, Ecology set up a moving target at the hearing in violation of due process. The Penalty Order cited one provision of law (NPDES permit required) but then Ecology relied upon a different legal basis at hearing (lack of

[17] *State v. Primeau*, 70 Wn.2d 109, 422 P.2d 302 (1967); *see also Kansas City v. Franklin*, 401 S.W.2d 949 (Mo. App. 1912). "[A]n information charging an ordinance violation...must nevertheless set forth the facts which if found true would constitute the offense prohibited by the ordinance." *City of Green Ridge v. Brown*, 523 S.W.2d 609, 611 (Mo. App. 1975).

a 404 permit), meaning that there not only was no notice whatsoever of what permit was supposedly required, but PTI received active disinformation about the charges. The Penalty Order alleged no facts as to why Ecology believed that the WPCA had been violated, leaving PTI to guess at how Ecology was applying the law. As demonstrated in Section IV(D), *infra*, the text of the statute does not give notice. The Penalty Order did not mention that Ecology would be seeking enhanced penalties based on "repeat violator" status, nor did it set forth any facts that it would be using to show that status. The Penalty Order did not give any notice of how the penalty had been calculated. Each of these is sufficient on its own to deny due process. Together, they make a deeply troubling and unfair proceeding.

Ecology's Penalty Order failed to provide any notice of how PTI allegedly violated RCW 90.48.144, RCW 90.48.080, or WAC 173-201A-300, and provided no citation to any statute or other rule that would give notice of what permits were necessary but not obtained:

> Notice is given that the Department of Ecology (department) pursuant to RCW 90.48.144 (3) has assessed a penalty against you in the amount of $88,000 for a violation of RCW 90.48.080 at the location known as Pacific Topsoils, Inc.'s Smith Island facility located at 300 W. Smith Island Road, Everett, Washington 98205. This penalty is based on the following findings:
>
> Prior to January 24, 2006, fill was placed in approximately 12 acres of wetland at Pacific Topsoils' Smith Island facility without a permit in violation of RCW 90.48.080. Discharge of such polluting matter into waters of the state is also a violation of the anti-degradation policy. WAC 173-201A-300. Fill remains in place in the wetlands. Each and every day the fill remains in the

> wetland constitutes a separate and distinct violation of RCW 90.48.080 and 90.48.160 and WAC 173-201A-300.

Order No. 4096 at 1, Appendix1.[18] ; ADR40-43.

Although the Penalty Order claims that PTI "unlawfully filled wetlands without a permit" in violation of RCW 90.48.080, the notice fails to disclose what permit Ecology was claiming PTI needed and why — and, indeed, fails to disclose Ecology's ultimate argument at hearing. The Notice does cite RCW 90.48.160, which governs NPDES waste discharge permits, but the Notice contains no factual assertions explaining why Ecology believed that placement of dirt on a field required an NPDES permit. This was not self-explanatory because an NPDES permit is usually required to discharge a contaminant into an actual body of water such as a stream or lake, or a sewer system that drains to such a body of water. *See* RCW 90.48.160. Indeed, Ecology abandoned that claim at the hearing and instead argued that PTI needed, but failed to obtain, a permit from the United States Army Corps of Engineers under Section 404 of the federal Clean Water Act – which was not noted in the Order. RP 75.

The Orders also charged PTI with violating anti-degradation policies set forth at WAC 173-201A-300. WAC 173-201A-510 states that anti-degradation policies are implemented through "issuance of waste discharge permits as provided for in RCW 90.48.160, 90.48.162 and 90.48.260." WAC 173-201A-

[18] The statutes referenced in the Notice of Penalty are RCW 90.48.080 [discharge of polluting matters into waters prohibited] RCW 90.48.160 [requiring an NPDES waste discharge permit] and WAC 173-201A-300 [describing the anti-degradation policy].

510 further states that "waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise must be conditions so that the discharges will meet water quality standards." The state anti-degradation policies describe designated beneficial uses of various navigable waters and the water quality criteria for those waters based on those uses. It specifies that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." *See* WAC 173-201A-035(8)(a). Nothing in the policy's text clarifies the Penalty Order or what Ecology would need to prove at hearing. Rather, the citation to WAC 173-201A-300 strengthened the impression that Ecology would argue an NPDES permit was necessary; "point source" discharges are the subject of both NPDES and the anti-degradation policy.

Most egregiously, the Penalty Order provides absolutely ***no facts*** giving PTI notice of the factual basis of Ecology's claim that it violated RCW 90.48.080, RCW 90.48.144, WAC 173-201A-300, or RCW 90.48.160. Although PTI was charged with depositing "polluting matters into the waters of the state," the Order failed to specify any facts giving notice of how placing clean fill in a field of grass constituted discharging "pollution" into waters of the state within the meaning of RCW 90.48.020 – and that is an essential question. This case was tried on a novel basis, and PTI had to guess at how Ecology would go about proving a WPCA violation. The Orders also failed to disclose

how PTI had violated the state's anti-degradation policies by injuring existing beneficial uses of the waters of the state.

These failures created great uncertainty about Ecology's burden of proof at the hearing. This case is the first time in which Ecology has imposed a penalty for violating the WPCA based on wetland filling. *See* ADR 2627, App. 3 (summary of cases before the PCHB in the last seven years). RP 588; ADR 566; 673; Appx. 17. The reference to NPDES not only failed to give proper notice of what Ecology would have to prove at the hearing, it actively threw counsel and PTI off track as to what claims Ecology would be making.[19] Even if it were permissible to require PTI to do legal research to remedy Ecology's failure of notice, no amount of research would have helped because Ecology has been proceeding on a novel theory.

Additionally, the Penalty Order failed to give constitutionally sufficient notice of the basis for the penalty amount; it had no mention of the "repeat violator" theory. No prior notice was given of the facts that would be alleged. PTI cold not refute these alleged other violations at the hearing because it had no advance notice of them.[20] The Penalty Order gave no other reasoning for the amount of the penalty. At the hearing, Ecology finally disclosed that the $88,000 penalty was based on eleven separate offenses that occurred on eleven

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[19] In order to have applied for an NPDES permit for depositing dirt on the wetland, PTI would have been required to provide data as to the background levels of dirt in the soil of the wetland. This demonstrates the strangeness of the NPDES claim.

[20] The Board had also imposed an arbitrary time limit on PTI's witness testimony, which would also have prevented any such witnesses from testifying.

separate dates, but this was not mentioned in the Orders. RP 330-331. PTI also learned at the hearing that Ecology had imposed an $8,000 per day penalty based on factors including the size of the fill and PTI's alleged "repeat violator" status. RP 330-331. PTI was forced to go to the hearing with no idea of how Ecology had calculated the penalty and what claims PTI would have to meet in order to argue for a reduced penalty.

D. Ecology failed to comply with RCW 90.48.120 (1).

Ecology failed to follow the WPCA's notice requirements. "[W]hen in the opinion of the department [of Ecology], any person shall violate... the provisions of this chapter... the department **shall notify** such person of its determination by registered mail." RCW 90.48.120 (1). Then,

> [w]ithin thirty days from the receipt of notice of such determination, such person shall file with the department a full report stating what steps have been and are being taken to control such waste or pollution or to otherwise comply with the determination of the department.

Ecology failed to comply with the statute at all. RP 230; App. 23. Ecology also failed to follow the notice procedures provided for emergency pollution events described in RCW 90.58.240. RP 231-234; Appx. 14.

The failure to provide statutory notice denied PTI an opportunity to come forward and explain that it had been actively working on a wetland determination since Ecology's request but, on the advice of its wetland consultants at Parametrix, was waiting until the early growing season to make proper studies of the area beneath the fill and adjacent to the fill. Notice would

have allowed PTI to have its team of experts – who are highly respected wetland biologists in the state of Washington – inform Ecology that it was studying the area beneath the fill. Because PTI was earnestly attempting to comply with Ecology's demand to present a wetlands study, in all likelihood, notice pursuant to RCW 90.48.120 would have prevented the penalty from being imposed at all.

The PCHB and trial court erroneously concluded that Ecology, had "substantially complied" with RCW 90.48.120. Paul Anderson testified that Ecology absolutely failed to give notice of its intent to impose a penalty. RP 231-234. In context of notice, unless there is actual and complete notice, the notice is insufficient. *Leson v. Ecology,* 59 Wn. App. 407, 799 P.2d 268 (1990) ("substantial compliance is actual compliance with the substance of a statutory requirement"). Ecology's total failure to provide notice of its intent to impose penalties by mail cannot be regarded as substantial compliance under Washington law. *See* Conclusion 15; ADR 1236.

E. Ecology's action has rendered the Water Pollution Control Act unconstitutionally vague as applied.

Ecology's misuse of the WPCA renders it vague as applied to PTI. The WPCA's text, including the pollution definition, neither states nor implies that filling a wetland constitutes polluting a water of the state.

> An ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. Such an ordinance violates the essential element of due process of law – fair warning. In the area of land use a court does not look solely at the

> face of the ordinance; the language of the ordinance is also tested in its application to the person alleged to have violated it.

Burien Bark Supply v. King Cy., 106 Wn.2d 868, 871, 725 P.2d 994 (1986) (internal citations omitted), *citing, inter alia, Grant County. v. Bohne*, 89 Wn.2d 953, 577 P.2d 138 (1978); *see also City of Seattle v. Crispin,* 149 Wn.2d 896, 905, 71 P.3d 208 (2003).

The Water Pollution Control Act provides no notice whatsoever that wetlands are regulated as a "water of the state".

> Whenever the words "waters of the state" shall be used in this chapter, they shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and water courses within the jurisdiction of the state of Washington.

RCW 90.48.020 (emphasis added). In fact, two Board findings are inconsistent with its conclusion that wetlands are waters of the state: the Board found that "a wetland is a transitional **land**" Finding No. 13 and in Finding No.1 that the PTI site "lies on the banks of the Snohomish River." ADR 1208; 1215. The definition of "waters of the state" in RCW 90.48.020 does not mention a wetland. Moreover, that definition must be reconciled with the treatment of water under the state surface water code codified at Chapter 90.03 RCW, and with the Legislature's definition of wetlands, as discussed extensively in Section IV(B)(3) of the present brief.

Nor does the statute's text give notice that clean fill is a pollutant:

> Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the

> physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

RCW 90.48.020. The statute gives no notice that clean dirt placed in a field is a substance regulated as a contaminant or pollutant. The WPCA prohibits discharge of substances which are intrinsically harmful and which impair public water supplies, such as oil (RCW 90.48.366), chlorinated organics (RCW 90.48.455), municipal wastewater (RCW 90.48.162), agricultural waste (RCW 90.48.450) or substances that harm public the health safety or welfare or interfere with the beneficial use of public water supplies. *See* RCW 90.48.020 (pollution definition). "Beneficial use" of a public water supply is defined elsewhere in Title 90 as the domestic, commercial, industrial, agricultural or recreational uses or other legitimate beneficial uses of public water supplies. *See* RCW 90.03.010 (governing public use of surface waters). Thus, the "pollutant" definition contemplates a substance which, when discharged into public waters, impairs the public's right to make beneficial public use of public waters, harms livestock, wild animals, birds or other aquatic life. RCW 90.48.020. The overall statutory scheme also demonstrates that clean fill is not in the category of "pollutant". RCW 90.48.530 recognizes that construction projects in public waters can involve placing clean fill in those waters, as authorized by Federal

Clean Water Act. There are things that clearly fall within the ambit of the statute; oil and industrial chemicals are two such pollutants. But the statute does not give notice that dirt placed onto the dirt of an alleged wetland and, in this case, an agricultural field, is a pollutant. For these reasons, the WPCA, *as it has been applied in this case*, violates due process because it is impermissibly vague.

Ecology's Notice of Penalty also stated that "discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300." The text of that regulation provides not the slightest notice that it prohibits placing clean fill onto an alleged wetland area. It does not mention wetlands and does not prohibit filling wetlands; thus, this Court should also rule that the WAC 173-201A-300 is vague as it has been applied in this case.

Although Ecology had specifically charged PTI with violating RCW 90.48.080 by discharging pollutants into waters of the state, even Ecology's own counsel was unable to see the connection between the text of the statute PTI was accused of violating and the alleged wrongful behavior of "filling of wetlands on the site". At the hearing, PTI's counsel asked Paul Anderson the following:

> But at the time that Ecology penalized Pacific Topsoils for discharging contaminants, pollutants, into the waters of the state, it didn't know, did it, if it was actually discharging into Puget Sound or Union Slough or any of the waters of the state or impairing those waters?

RP at 272. Ecology's counsel objected to the question, stating:

> Objection. That's not the basis for the penalty, and so it's asking Mr. Anderson to come up with a basis for the penalty that was not in the record. The penalty is for the filling of wetlands on the site.

RP 272. Counsel for PTI rephrased the question to emphasize the term "pollutants": "Well, isn't it true, Mr. Anderson, that you didn't have any concrete knowledge that pollutants were being discharged into Union Slough or Puget Sound at the time that the penalty order was issued?" RP 272-73. Again Ecology's counsel objected: "The objection remains the same. It's not the basis for the penalty." *Id.* This confusion is borne out yet again in the Board's findings and decision, which makes no findings about whether "pollutants" were discharged into "waters of the state", but instead finds that the wrongful behavior was failing to obtain a 404 permit from the Corps before filling a wetland. ADR 1228; Finding 29.

F. The "fair notice" doctrine bars this penalty.

Even if this Court decides to defer to Ecology's reading of the statute and regulations, it should still deny Ecology its $88,000 penalty if the Court finds that Ecology's interpretation is not "ascertainably certain" from the plain text of the statute and regulations.

> Due process requires that parties receive fair notice before being deprived of property. The due process clause thus prevents ... deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.

General Electric Corp. v. Environmental Protection Agency, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)(violation and penalty invalidated because agency's position was not "ascertainably certain" from the text of the regulations)(internal citations and quotes omitted); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)(the law must provide fair warning by the text of the statute).

The interpretation that placing clean fill dirt on the dirt of a wetland constitutes "pollution" of "waters of the state" and subjects one to penalties is not "ascertainably certain" from the text of the statute. PTI is Ecology's canary in the coal mine in its bid to extend the WPCA to cover wetland filling. Members of the public, such as PTI and its workers, had no notice of Ecology's claimed authority to issue fines for placing dirt on wetlands. Ecology has made no official interpretation of the WPCA stating that placing clean fill on an alleged wetland constitutes polluting a surface water of the state. No published cases and no provisions in the WPCA provide notice of such a construction. Further, because Ecology failed to comply with RCW 90.48.120 and give PTI written notice of its interpretation that placing fill in an alleged wetland constituted polluting surface waters of the state, PTI had no notice of this departmental interpretation until after the Department had issued its Administrative Orders – and, indeed, until the Board hearing itself. According to Erik Stockdale, who heads Ecology's Shorelands and Environmental Assistance Unit, this is the first time that his division has so construed the

WPCA during the 15 year period he has worked there. This was a novel use of the WPCA by a division of Ecology that does not usually enforce it, and it would be unjust to uphold the penalty against PTI in this case of first impression. RP 588; ADR 566; 673.

In order to relieve PTI of this unfair and excessive penalty under the fair notice doctrine, the Court is not even required to reject Ecology's construction of the statute and regulations. *General Electric*, 53 F.3d at 1327 (according deference to the agency's interpretation of the regulations); *Rollins Environmental Services (NJ), Inc., v. Environmental Protection Agency*, 937 F.2d 649, 652 (D.C. Cir. 1991)(same). If the Court decides to defer to Ecology's reading, then it should find that reading was not "ascertainably certain" under the plain text of the statute and regulations and vacate the penalty.

G. Ecology utterly failed to prove the violation.

It was Ecology's job at the PCHB hearing to prove that PTI violated the statute. To determine whether a statutory provision has been violated, the Court looks to each essential element provided by the statute's language. *See, e.g.*, *Internet Community & Entertainment Corp. v. State*, 148 Wn. App. 795, 201 P.3d 1045 (2009), *review granted*, 166 Wash.2d 1019, 217 P.3d 335 (Sep 08, 2009). Ecology had to prove every essential element of RCW 90.48.080 to justify its $88,000 fine. *Mansour*, 131 Wn. App. at 270-72.

The elements of the violation which Ecology needed to prove at the hearing are derived from the text of the statute itself, which provides:

> It shall be unlawful for any person to throw, drain, run, or otherwise ***discharge*** into any of the ***waters of this state***, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall ***cause or tend to cause pollution of such waters*** according to the determination of the department, as provided for in this chapter.

RCW 90.48.080 (emphasis added). That means that Ecology had the burden to produce sufficient evidence that PTI (1) discharged (2) matter that causes or tends to cause pollution (3) into waters of the state. It was not PTI's burden to prove that it had not done these things. While PTI admitted that it had "discharged" something – *i.e.*, it had placed a stockpile of fill on its land – Ecology failed to bring even a scintilla of evidence to show that the fill "caused or tended to cause pollution". In addition, Ecology failed to prove that the fill was placed "into any of the waters of this state" because it brought insufficient evidence that the field is wetland or water. The Board erred by entering findings and conclusions not supported by the evidence, and by affirming an excessive penalty that was not justified by the evidence in the case. The Board must be reversed as a matter of due process.

1. Ecology produced no evidence that the fill caused pollution, an essential element of the violation.

Ecology produced no evidence whatsoever in the Board hearing to show that the fill "caused or tended to cause pollution", an essential element of the violation. "Pollution" under the WPCA means:

> such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

RCW 90.48.020. No witness testified that placing the dirt on the field caused any contamination, altered any physical, chemical, or biological properties, or made any harmful or detrimental change to any waters of the state, including the alleged wetland itself. Ecology employees Anderson and Stockdale testified that they had no idea what conditions existed beneath the fill, and conceded that wetland expert Dr. James Kelley and geotechnical expert Jon Sondergaard were the only experts who *had* studied the area beneath the fill. RP 477-480, 590; Appx. 2 and Appx. 19. Sondergaard gave unrebutted expert testimony that his tests showed the fill had not changed the characteristics of the soil beneath the fill, had not squeezed the moisture out of the soils, and had not damaged the area under the fill. He testified that the soils under the fill had the same pore spaces which could accommodate moisture and that the fill did not prevent the area

beneath the fill from being recharged by rain water. RP 481-493; Appx. 20. Moreover, PTI employee Thomas Finnerty testified that the fill was clean and had to meet certain specifications of purity because it was being used as a Model Toxics Control Act remediation cap, and was simply clean dirt. RP 507-08; Appx. 21. Ecology's counsel *argued* to the Board that the fill would squeeze water out of the alleged wetland, but "an attorney's statement or argument is not evidence." *Jamaica Ash & Rubbish Removal Co., Inc. v. Ferguson*, 85 F.Supp.2d 174, 182 (E.D.N.Y.,2000). Ecology presented no testimony as to how the fill was a pollutant in the meaning of the statute, and thus failed to prove ***an essential element*** of the violation.

The Board found that PTI had contaminated state waters by filling a wetland, and found that PTI had "altered the physical properties of Smith Island wetland areas". *See Conclusion No. 8 and 18.* But the Board heard absolutely no evidence to support those findings and conclusions. The Board simply assumed that dirt is a contaminant or pollutant. But a Section 404 permit from the Corps would have authorized PTI to place that very fill in a wetland, because it is not, by itself, a contaminant. Particularly since a wetland *is* soil, the Board's assumption that soil is a pollutant was impermissible.

By concluding that PTI had "altered the physical properties of wetlands" despite Sondergaard's unrebutted expert testimony to the contrary, the Board violated the rule that administrative tribunals cannot reject expert testimony in favor of their own subjective theories. *Hoffman Holmes v. Environmental*

Protection Agency, 999 F.2d 256 (1993)(declining to hold that an area was a wetland because that conclusion "was merely speculation based on the assumption that Area A was a wetland similar to Area B"); *Tanner v. Conservation Comm'n of City of Norwalk*, 544 A.2d 258 (Conn. App. 1988)(wetland commission's decision vacated because it ignored two experts' opinions, instead relying on its own judgment though it lacked technical expertise). The Board ignored geotechnical expert Jon Sondergaard's unrebutted, unimpeached testimony about his tests which demonstrated that the characteristics of the land beneath the fill was unchanged and that the soil continued to have pore spaces that retained moisture. The Board also ignored his testimony that the fill did not impair the recharge of aquifers by rain. The Board itself has no expertise about wetland issues or soil compaction; in the last seven years it has only addressed wetland issues on a very few occasions. *See* App. 3. ADR 2627.

Moreover, even if the Board had expertise in wetlands, it would have been required to base its conclusions on facts in the record, not on conjecture and speculation. *Time Oil Co. v. City of Port Angeles*, 42 Wn.App. 473, 480, 712 P.2d 311 (1985), *Riccobono v. Pierce Cy.*, 92 Wn.App. 254, 268, 966 P.2d 327 (1998)(reversing award for future economic loss because expert's opinion was based on assumptions for which there was no factual basis). There is absolutely no factual basis in the record for the Board's conclusions that the fill altered the physical properties of wetlands, eliminated them, or damaged them.

2. *Ecology lacked evidence of the presence of wetlands, an essential element of the violation.*

Ecology failed to produce sufficient evidence to support another essential element of the violation charged in the Penalty Order: that the fill was placed in "waters of the state". Under Ecology's theory of the case, wetlands were the "waters of the state".[21] The question of whether land is wetland is not a pure question of fact. It is a mixed question of fact and law, because it requires taking data from testing and scientific observation and applying legal standards to arrive at a conclusion. *Tapper*, 122 Wn.2d at 403. "Wetland" is a term defined by law, and in order for land to be lawfully regulated as wetland, it must be shown that all three wetland parameters exist concurrently: hydrophytic vegetation, wetland hydrology, and hydric soils. *WDM* at 6, ¶¶16-17; 57¶ (d). Ecology's regulations and Wetland Delineation Manual provide legal standards that are applied to the data to make the wetlands determination. This Court reviews the application of the law to questions of fact *de novo*. *Tapper*, 122 Wn.2d at 403. The more deferential "substantial evidence" standard applies only to raw facts, such what vegetation species were found on the site. *Id.* "When findings of fact are not explicitly delineated, or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below." *Id.* at 406.

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[21] We assume for the purposes of this argument that wetlands satisfy the definition of "waters of the state" under the WPCA; however, PTI does not concede that this is a permissible construction of the statute.

Although Ecology's action and its penalty calculation were based on the allegation that PTI had placed fill on twelve acres of wetland, Ecology produced almost no concrete evidence that wetlands existed where the stockpiles of fill had been placed, and produced no evidence whatsoever to support its position that the entire 12-acre filled area was wetland. It relied mainly on Paul Anderson's half-hour walk around the site and a preliminary report that was not based on any actual study of the land beneath the fill but on background "big-picture" materials such as aerial photos and soils maps. By contrast, PTI's witnesses produced overwhelming evidence that, in fact, the stockpiles had been placed on upland areas and that, at the very most, one-tenth (0.1) to one-fifth (0.2) of an acre of "possible wetland" could have been covered. ADR 1916; Appx. 2.

Paul Anderson's On-Site Investigation

Ecology's Eric Stockdale and Paul Anderson, who spearheaded this enforcement action, conceded at the hearing that they had no idea about the character of the land beneath the fill. RP 590; RP 477-480; Appx. 11; Appx. 12. Anderson's site examination on October 27, 2006 was exceedingly superficial. RP 167; 237. *See* Appx. 22; Appx. 4; ADR 2109. He took no measurements and a single short paragraph of notes in the field. *Id.* Appx. 4. He testified that he was on the site for 20 minutes to half an hour and dug four soil pits during that time, taking notes of findings from only one of those soil pits. RP 279 – 280, *see* App. 22. The scant paragraph of notes Anderson made during his site

visit shows he did not find the three parameters which define a wetland; he simply found wetland soils. ADR 410; Appx. 4. Even on the wettest part of Pacific Topsoils' site, he found "moist soils" but did not find wetland hydrology. ADR 2109; App. 4; ADR 306; Appx. 5. Anderson viewed the site again in August 2008 with the Snohomish County Hearing Examiner, and then he and Stockdale conducted another site visit in September 2008. RP 293. On that visit to the site, Stockdale and Anderson dug a few soil pits, but did not find any conventional evidence of hydrology. ADR 305-307; Appx. 5. They found some oxidized rhizospheres, which Ecology itself designates as an unreliable secondary indicator of hydrology that should not be relied upon for a site that has been diked, drained, and farmed. WAC 173-22-080.

Paul Anderson's opinion of the area beneath the fill changed dramatically at the Board hearing. At his prehearing deposition he had testified that aerial photographs, including the 2002 photograph on which he would later rely heavily at the Board hearing, did not demonstrate the presence of wetland vegetation. *See* Appx. 22. His July 17, 2008 report did not find either wetland hydrology or wetland vegetation. ADR 305-07; Appx. *5.* He noted in that report that "management as a farmland may have significantly altered the hydrology in plants when wetland conditions were not present." ADR 305[Ex. 71, ¶ 4]. He stated that "most of the vegetation I observed during my site visit on October 27th was non-native pasture grasses and that "beyond the filled area the site had been tilled, planted in grasses and mowed." ADR 306. *See* Ex. 71, ¶

6, App. 5. However, at the Board hearing Anderson testified that he found the site was wetland. RP 591. The Board relied heavily upon Anderson's testimony in preference to Dr. Kelley's.

Parametrix Report

The only study Ecology presented as to the existence of wetlands under the fill was a preliminary wetland report prepared by Parametrix, Inc. That report was created in preparation for PTI's Snohomish County grading permit application so that PTI could remove the stockpile of fill. Parametrix had marked its report as "preliminary" and had warned PTI that it was not actually based on an investigation of the land under the fill. RP 568-570, ADR 1199-1202; Appx. 9. Ecology relied heavily on the Parametrix report, yet did not produce a witness from Parametrix to provide foundation for the report or to explain why this admittedly "preliminary" report should be favored over Dr. Kelley's extensive on-site investigation of the land under the stockpiles of fill.

Wetland biologists from Parametrix had done a preliminary wetland study around the fill during abnormally wet conditions. RP 377; Appx. 9.[22] They had not conducted any studies of the area beneath the stockpile of fill, and had told PTI on several occasions that it was necessary to study the area beneath the fill before determining whether wetlands were present on the site. *See* App.9; ADR 567. Marty Louther, the senior wetland biologist who supervised the Parametrix

[22] The Parametrix study and report were produced in a short timeframe in order to comply with a deadline for a grading permit application under a Voluntary Compliance Agreement with Snohomish County.

study, wrote a memo February 4, 2007 (before issuance of Ecology's Penalty Orders) cautioning PTI to include a disclaimer if it submitted the study in conjunction with its Snohomish County Grading Permit application:

> Per our telephone conversation today, I had recommended that Pacific Topsoil include a submittal letter to the County for the grading application. In this letter, I suggest that a disclaimer is provided regarding how the wetland fill area was determined. In addition, you have asked whether or not PTI should do additional soil borings in the wetland area, and I agree with that approach.....
>
> Parametrix has preliminarily determined that about 7.81 acres of wetland has been filled on the Smith Island site (in a January 24, 2007 technical memorandum). This area has only been estimated based on aerial photographic interpretation, data collected from on site wetlands and best professional judgment. Soil built borings were not conducted to determine the limits of the potential wetland fill.
>
> In order to more accurately determine area of wetland fill, Pacific Topsoils is in the process of working with Parametrix wetland biologist to dig soil pits within the existing fill pile to further define the amount of potential wetland area that was filled. Once this data has been collected and analyzed, it will be presented to Snohomish County, Ecology and the Corps for their verification.

ADR 568 [Appx. 9]. Parametrix was concerned about the preliminary nature of its information and repeatedly urged Pacific Topsoils to do further studies of the area beneath the fill. RP 133-137; Appx. 9; ADR 2713. Indeed, Parametrix had cautioned PTI that it had simply speculated as to what was under the fill and more study was required:

> With regard to your question of whether they were able to determine if it is in fact wetlands that were already filled, the memo states without excavating the existing fill material, it is

> impossible to quantify how much, **if any**, of the 11.02 acres of area meets with the wetland criteria.

ADR 567. *See* App. 10 (Dec. 26, 2006 letter) (emphasis added).

The Board was aware of all of this; nevertheless, it refused to allow any testimony on these points based on an arbitrarily-determined time for presentation of witnesses. It would not allow Becky Reininger, a witness from Parametrix who would have testified about the preliminary nature of the Parametrix study, to testify. RP568. The Board ended up relying heavily upon the Parametrix study instead of Dr. Kelley's and Sondergaard's studies.

Dr. Kelley testified that the Parametrix report improperly studied a site with complex hydrology outside of the growing season following a period of historic rainfall. RP 377. Further, the study did not clearly identify the aerial photographs on which it based its conclusions and did not identify topographic study it utilized. RP 374-379. Thus, it was impossible to verify the data on which it was based. RP 374-392.

The Kelley and Sondergaard Studies

PTI asked Dr. James Kelley, a prominent wetland expert, to conduct a wetlands delineation of the site. Dr. Kelley came in after Parametrix had already conducted its preliminary survey. Dr. Kelley testified that Parametrix had called in Cascade Drilling "to drill through the fill because there was uncertainty about conditions under the fill." RP 349. Parametrix's Marti Louther and Dr. Kelley designed a plan for sampling the area beneath the fill

and directed drillers to drill in particular areas in order to study the soils beneath the fill. Dr. Kelley, after sampling the area beneath the fill, did a delineation during the early growing season.

Dr. Kelley testified that he actually bored holes into the fill, extracted native soils from beneath it, and characterized those soils. Dr. Kelley and Mr. Sondergaard are the only experts who made such studies of the soil underneath the fill. RP 472-480. Dr. Kelley determined that the wetland parameters had not been met.

He testified that the proper time for conducting a wetlands delineation on that site is the early growing season, beginning in March. RP 365-66. Geo Engineering, which had done wetland studies on the adjacent Norwest Concrete and Cedar Grove sites did studies in the early growing season (April). RP 365; Appx. 18; Appx. 17; ADR 2814; 2961.

Dr. Kelley also testified, referring to Ecology's own regulations and Manual, that Paul Anderson had employed the wrong analysis in determining whether the wetlands definition was met. Dr. Kelley testified that, under Ecology's own regulations, the "problem area methodology" was the correct method to use on unfilled areas of the site, rather than the "atypical methodology" Anderson employed, because the original hydrologic regime had been altered significantly by human activity over at least a century of diking, draining, mowing, planting, and tide gating. RP 345-46. Dr. Kelley found that, at most, 0.1 to 0.2 acre of the filled area was "possible wetland" – meaning that

only 0.1 to 0.2 acre might present all three wetlands parameters. ADR 1916; Appx. 2. That methodology requires studying a site with complex hydrological conditions during the early growing season. WDM 27.

Jon Sondergard, a partner at Environmental Associates who specializes in geotechnical analysis and hydrological matters, conducted compaction tests to determine the effect of the fill on the underlying soils. He determined that the weight of the fill did not result in "squeezing" water out of the soils as argued by Ecology's attorney, and that the soil beneath the fill had pore spaces that collected moisture. He testified that principles of hydrology dictated that the area beneath the fill was able to be recharged with water. RP 481-93. His testimony was unrebutted – and yet the Board ignored it. *See* Appx. 20.

Eric Stockdale, Ecology's Senior Wetland Biologist, unequivocally that "[the Kelley study] is the only study that has looked at wetland conditions beneath the fill." RP 480-482; Appx. 11. Paul Anderson also conceded that Kelley and Sondergaard were the only experts who had studied the area beneath the fill. RP 590; Appx. 12.

The Board elected to rely mainly on the preliminary hearsay Parametrix report and the testimony of Ecology employees Anderson and Stockdale, who had not done wetland delineations, and to ignore the testimony of experts Kelley and Sondergaard. Members of the Board apparently assumed that simply going to the site for short visits constituted "delineating" a wetland and thus mistakenly concluded that Anderson and Stockdale had performed wetland

delineations. Conclusion 15, 16, 17; ADR 1217-1219. As a result, the Anderson and Stockdale testimony about the site, which was based merely on viewing the site, assumed disproportionate importance. Appx. 15. At the same time, the Board ignored the Kelley delineation and testimony, which was conducted in conformance with Ecology's own regulations and was the only evidence regarding the presence and extent of wetlands based on scientific study and on facts in the record rather than on speculation. It was the sole study conducted during the growing season.

The Anderson and Stockdale expert testimony and the Parametrix report were all speculative at best. There is no value in an expert opinion that is wholly lacking in a factual basis. 5A K. Tegland § 304 at 451. *See Davidson v. Municipality of Metro Seattle,* 43 Wn.App. 569, 579, 719 P.2d 569, *review denied*, 106 Wn.2d 1009 (1986)(presumptions may not be piled upon presumptions nor inference upon inference). The Board's conclusions based on this testimony thus lacked substantial evidence in the record. *Time Oil Co.*, 42 Wn.App. at 480; *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 102-103, 882 P.2d 703 (1994).

H. The Board made several reversible errors on fact questions, law questions, and mixed questions of law and fact.

1. The board wrongly found the existence of wetlands was proved although it found only "one or more" of the three wetlands parameters were present.

The Board found that wetlands were present because "investigators found that Pacific Topsoils' site has ***one or more*** of the wetland indicators."

Finding No. 18 (emphasis added). This is a major error; by law, ***all three*** parameters must be present before land may be called a wetland and regulated as a critical area. *WDM* at 6. The three indispensable wetland parameters are: hydrophytic vegetation (vegetation adapted to grow in saturated or anaerobic soils), hydric soils (upper soil layers formed under conditions of water saturation), and wetland hydrology (a water regime that inundates or saturates the soil surface for at least 14 consecutive days **during the growing season and under normal weather conditions**. *WDM 28* ¶16-17; 57 ¶(d)[23]; WAC 173-22-080. RP 369-373. This is a mixed question of law and fact reviewed *de novo*. *Tapper,* 122 Wn.2d at 402-03.

2. The Board erred in deciding that wetland hydrology was present.

The Board erred in its determination of the mixed question of fact and law of whether wetland hydrology is present, a mixed question of law and fact. "Recurrent, sustained saturation of the upper part of the soil profile is the most basic requirement for wetlands." *WDM* at v.

> CAUTION: It is necessary to have good documentation that the area experiences prolonged inundation and/or saturation in order to call it a wetland. The presence of standing water or saturated soil on a site at a single point in time or for short periods is insufficient evidence that the species present are able to tolerate long periods of inundation.

[23] The legislature required the Department of Ecology to adopt a manual to control wetlands delineation methods. RCW 90.58.380. The WDM is the accepted arbiter of scientific standards for wetlands delineation in Washington.

WAC 173-22-080(5)(b)(i)(original emphasis removed). On sites where historic diking, tide gates, drainage, and farming have altered the original hydrologic regime, evidence of hydrology must be rigorously evaluated, and reliance on secondary indicators such as oxidized rhizospheres is not scientifically valid. *WDM* at 6, ¶¶16-17; *57 ¶(d)*. The Board relied on the existence of oxidized rhizospheres and the historic hydrologic regime to conclude that wetland hydrology was present, having made no findings that the area experienced prolonged inundation or saturation. Finding No. 21. But because the site had been diked, drained with drainage tiles and ditches, protected from tidal and aquatic influences by tidegates and levees by PTI's predecessors, and since the land had been farmed since the mid-nineteenth century, the regulations required extreme care in evaluating wetland hydrology. WAC 173-22-080(6).[24]

The Board's finding that Anderson noted the presence of "prolonged inundation of soils" was not supported by any evidence in the record. [Finding No. 14]. In fact, Anderson's field notes note that he found "moist soils", but did not note finding wetland hydrology. ADR 2109 [*Appx. 4]*. ADR 305 ¶ 4;, *Paragraph 11, Appendix 5].*[25] RP 296. He testified that during dry seasons on PTI site, wetland hydrology might not be apparent. ADR 566; Appx. 5; RP 292.

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[24] Even Anderson admitted that "Active management (eg. diking, drainage or mowing) may sufficiently alter the site so that wetland conditions are not present. If active management is discontinued, particularly on flood plain sites such as the present property, **wetland conditions may re-establish**." ADR 305 ¶ 2(emphasis added).

[25] No evidence in the record establishes that Paul Anderson specializes in hydrology identification and the wetlands rating system, as the Board found in Finding No. 15. In fact, Anderson testified that he had specialized in wildlife habitats for the purpose of his Bachelor of Arts and

Historic conditions

In total violation of the regulations, the Board concluded that historic wetland conditions can establish the wetland hydrology parameter even if such a hydrologic regime no longer exists. The Board detailed that historical structures "such as levees, dikes and similar structures, ditches" establish that wetland hydrology existed once on the Pacific Topsoils' site. *Finding No. 21.* The Board made a critical error, however, in finding that "if there is evidence that hydrology existed prior to site alteration, investigators can determine that the hydrology criteria is satisfied." *Finding No. 21.* This is totally incorrect; the regulations require that wetland hydrology must **currently** exist, and require strong evidence of current wetland hydrology where the original hydrology was lawfully altered. WAC 173-22-080.

The WAC provides that the atypical analysis used by Anderson should not be applied to sites where the natural hydrologic regime was changed by human activity that is exempt from regulation because it was performed before "legal jurisdiction of an applicable law or regulation took effect," such as the historic dikes, drains, levees, and tide gates on this site. WAC 173-22-080(11). The Manual observes that "human disturbance, especially in agricultural lands may necessitate more rigorous analysis to determine the frequency and duration of inundation or saturation." *WDM* at 30. RP 369-373; Appx. 2. The Board's

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Master of Arts degrees and that he had simply received training about hydrology and the wetland rating system. He did not have any advanced coursework in either subject. RP 156.

Findings and Conclusions, which are actually mixed findings of fact and conclusions of law, demonstrate its failure to understand the need to use the problem-area methodology to study the unfilled 25-acre area next to the fill before application of the atypical method to filled area. RP 442-445; Appx. 19. That unfilled area adjacent to fill did not exhibit hydrology during the later part of the growing season.[26] ADR 416; Appx. 6; ADR 305 ¶ 2; Appx. 5; ADR 410; Appx. 6; ADR 566; Appx. 13. ADR 305 ¶ 2; ¶4; ADR 306 ¶5; ADR 308 ¶11; Appx. 5.

Oxidized Rhizospheres

Ignoring the regulations, the Board found that oxidized rhizospheres were a "primary wetland indicator" and that where there has been filling of a field, "some primary indicators may no longer be present and investigators must rely on indicators such as oxidized rhizospheres, water stained leaves, plant adaptations and soil hydrology data including **hydric soils** for their conclusions." Finding No. 20; ADR 1221. Nowhere are oxidized rhizospheres described as "primary" indicators of hydric soils which are used if a field has been filled. Indeed, under the regulations' ranked listing of indirect indicators of hydrology, listed in descending order of reliability, oxidized rhizospheres are only number 7 out of 10. WAC 173-22-080(10)(vii); *WDM* at 33-34. RP 399. The regulations state that the delineator should proceed with caution if oxidized

[26] Ecology employee Anderson's field notes indicate that during his cursory 20 to 30 minute inspection of the 37 acre field when he did not find wetland hydrology during the October 27, 2006 site visit. WAC 173-22-080(5)(b)(i).

rhizospheres are the only indicators of wetland hydrology present and that "**Oxidized rhizospheres should be supported by other indicators of hydrology if hydrology evidence is weak.**"

Soils Maps

Contrary to the Board's findings, (Finding 21; ADR 1222-1223), the Natural Wetlands Inventory and Soil Maps do not establish hydrology. RP 167; 180;293. The National Inventory of Wetlands itself warns that it does not accurately depict wetland boundaries, is not based on actual field sampling, and is only to be used as a background source. *Id.* Findings 18, 20 and 21, which are actually mixed findings of fact and legal conclusions, show that the Board totally misunderstands the requirements for characterizing wetlands. ADR 1219-1223.

Growing season

For an area to be a regulated wetland, wetland hydrology must be present during the growing season for a period equaling at least 12.5 % of the growing season. *WDM* at 11 ¶ 3. The growing season is defined as "the portion of the year when soil temperatures at 19.7 inches below the soil surface are higher than biological zero (41°F)." *WDM* at 28 ¶ 46. "[I]t is essential to establish that a wetland area is periodically inundated or has saturated soils for a sufficient duration **during the growing season**." *WDM* at 27 (emphasis added). In fact, it is crucial to study wetland hydrology during the early growing season, March

through April. *Id.* at 28.[27] Even though the Manual states that "[t]he growing season in Western Washington is March 1 to October 31", *Id.* at 29, the Board found that "in some coastal areas" such as Smith Island, the growing season can be all year round. Finding No. 17. This was error; extensive climate and other scientific data was before the Board to the contrary. Appx. 17.

Professional judgment must be used in determining the growing season for a particular delineation site. *WDM* at 28. Dr. Kelley testified that he used his professional judgment in determining that the growing season at PTI's site is **not** all year long. RP 352 at 2-25; RP 353 at 1-9; RP 366 at 6-22. He testified to finding ice in bore holes during the winter months. Dr. Kelley observed frost, snow and frozen ground onsite in November. He testified that the plants were brown and there was no green vegetation. RP 366. Based on the climate data[28] and onsite observations, he concluded that at this coastal location the growing season is not year-round. By contrast, Ecology's witnesses merely speculated that the growing season on Smith Island was year round, with no support from wintertime observations or temperature data. *See, e.g.*, RP 549. The Board

[27] There is no evidence in the record to support the Board's finding that Paul Anderson visited the site on April 7, 2007 to determine whether the site contained wetlands. [Finding 14 and 17]. Testimony in the record clearly establishes that he visited the site on October 27, 2007, briefly visited the site for a few minutes to view it with the Hearing Examiner on August 7, 2007, and briefly visited the site, with Erik Stockdale, in September.

[28] A site's growing season is determined using climate data provided in most modern soil surveys; the growing season can be from the last date in spring that the air temperature drops to 28°F to the first date in the fall that it drops to 28 °F. This assessment was used by Dr. Kelley in his delineation. The Natural Resource Conservation Service (NRCS) climate data for Everett shows temperatures above 28°F between February 28 and November 20. RP 2033. Weather at this Everett reporting station is representative of the conditions at the the Smith Island site because the site is near sea level and the nearby reporting station is only 60 feet above sea level RP 2033. [Kelley App. G, App. 13]

ignored Dr. Kelley's evidence. Once again, the Board improperly relied on Ecology's speculative expert testimony which was supported by no facts. *See Time Oil Co.,* 42 Wn.App. at 480.[29]

3. The Board erred in finding that wetland vegetation was present.

The Board concluded that wetlands have vegetation "growing in water or on a substrate that is at least periodically deficient in oxygen as a result of water contact." Finding 13. The Board apparently took this finding from the WDM's definition of "hydrophytic vegetation", see WDM at A-5, but totally failed to understand that this vegetation can only rightfully be called "wetland vegetation" when it grows in hydric soils, not in water, **and** when both wetland hydrology and hydric soils are present. *WDM* at A-5.[30] *See* RCW 90.58.030, RCW 90.46.010 (21), *and* RCW 36.70A.030 (21). In Finding No. 19, the Board erroneously concluded that reed canary grass and salmonberry disclose the presence of a wetland. In fact, these are facultative species which grow as well in non-wetland upland areas. *See* RP 460-464. [Kelley testimony]. Indeed, Paul Anderson's July 17, 2007 report states that the "current facultative community"

[29] Neither the regulations nor the testimony at hearing support the Board's Conclusion No. 3 that the purpose of the Wetland Delineation Manual is to provide methods to allow an accurate delineation at any time of the year. In fact, the Manual clearly states that "in some cases it may be necessary to withhold making a final wetland determination until a site is examined during the wet part of the growing season." *WDM* at 80.

[30] "Hydrophytic vegetation - The sum total of macrophytic plant life growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content. When hydrophytic vegetation comprises a community **where indicators of hydric soils and wetland hydrology also occur**, the area has wetland vegetation." *WDM* at A-5.

of salmonberry and reed canary grass does not demonstrate the existence of a wetland. ADR 306 ¶ 6 [Ex. 71, App.5].

4. Other factual findings not supported by the record

Finding No. 20 shows that the Board misunderstood how wetland soils are established and that it confused wetland soils with wetland hydrology. Contrary to Board Finding No. 13, there is no authority in either the WDM or Chapter 173-22 WAC supporting its conclusion that "wetland or aquatic processes are indicated by hydric soils."

No credible evidence supports the Board's conclusion that mosaic wetlands existed on the site. *See* Finding 2 and Conclusion 18; ADR 1208; 1238. Dr. Kelley, who studied the area beneath the fill, did not testify that mosaic wetlands existed on the site; neither did the wetland biologist from Geo Engineering who studied wetlands on the adjacent Cedar Grove property and Northwest Concrete property. ADR 2814; 2961. This theory was only supported by hearsay testimony by Cedar Grove witness Mark Wolken that in the 1980s a wetland consultant had told him that there were mosaic wetlands in the field.[31] RP 66, 79. PTI's counsel objected to this hearsay testimony.

[31] Moreover, Mr. Wolken's overall testimony showed that he was a biased witness. He works for Cedar Grove, PTI's main market rival. He testified that he provided the Everett Shoreline Coalition with many pages of aerial photographs which he had labeled and assembled after a flyover paid for by Cedar Grove. He testified that he had provided copies of such materials to the Snohomish County executive. He also testified that Dave Forman, one of the owners of Pacific Topsoils had declined to enter into a partnership with him and to develop a facility on the Smith Island field. *RP 57-59; 79.*

The Board erred in accepting Ecology's claim, supported by no evidence in the record, that the capillary fringe for soil at the site is 14-22 inches. Both the WDM and the WAC state that "[i]f the water table (the level at which standing water is found in an unlined hole) is found within twelve inches of the soil surface in a non-sandy soil, one can assume that soil saturation occurs to the surface." WDM at 32; WAC 173-22-080 (10)(ii). Ecology employee Anderson's July 5, 2007 report acknowledges that "capillary fringe usually extends 12" above the water table" but at the hearing, he changed that conclusion. ADR 305 ¶1; Appx. 5. By alleging that the capillary fringe is deeper than the 12 inches specified in the regulations, Ecology's witnesses managed to make the evidence for wetland hydrology sound stronger than it actually was.

No evidence in the record supports Finding No. 19 that the unfilled circular area was representative of the area beneath the fill; that is solely speculation. Dr. Kelley testified that the unfilled circular area surrounded by fill was a wetland based on his field studies – but he also specifically testified that the area beneath the fill, based on field studies of such soils, was not wetland. RP 408. Dr. Kelley is the only expert who provided actual evidence about area beneath the fill, and the Board was not entitled to ignore that testimony in favor of its own speculative theories.

The Board erroneously found that Ecology did a delineation of the site, *see Finding No. 16*, and that "the wetland delineation work done by Ecology and

Parametrix in November and December of 2006 is valid." *Finding No. 17.* This finding is contradicted even by Ecology's witnesses. Paul Anderson repeatedly testified that he had not done a delineation of the site. RP 188, 210, 257; ADR 437-439; App.15. Eric Stockdale testified that when he went to the site with Paul Anderson in September, 2007, he simply confirmed Anderson's observations. RP 555. Neither Anderson nor Stockdale claimed that they did a wetland delineation during their short visit that day.

PCHB upheld the penalty orders (Conclusion 21) imposing liability on Dave Forman, an individual. PTI is a corporation and there was no factual or legal justification advanced for imposing a penalty on Mr. Forman, an individual. No evidence in the record supports that determination.

I. The Board's refusal to allow PTI to make its record and to fully argue the points of fact and law was reversible error.

A fundamental requirement of due process is a full and complete hearing "which includes the right to cross examine, to meet opposing evidence, and to oppose with evidence." *Matter of Marriage of Glenn*, 856 P.2d 1348, 1351 (Kan. App. 1993). The opportunity to be heard must be given "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The Board consistently failed to apply its procedural rulings evenhandedly, denying PTI the opportunity to be heard. The most egregious example of this was that the Board denied PTI the opportunity to cross-examine important witnesses and to present some of its own witnesses. In

its prehearing order, the Board allocated a mere six hours for PTI to present its case, an arbitrary time limit, imposed without consideration of the actual amount of testimony required. The Board counted all of the following against PTI's six hours: objections, PTI's cross-examination of Ecology's witnesses, the Board's own questioning of PTI's witnesses, and the opening statement. PTI had no control over how long the Board or Ecology took questioning its witnesses; for example, the Board cross-examined Dr. Kelley for over an hour. PTI twice requested additional time to present its case; the Board denied those requests. RP 564-570; ADR 1199-1202. PTI presented offers of proof about witnesses it needed to present. RP 568-570.

After PTI's six hours ran out, the Board denied any more time to cross-examine Ecology's witnesses who had testified for several hours or to complete its case and present its other witnesses.[32] The Board gave PTI a mere three minutes in which to finish its case. *RP 564-570; ADR 1199-1202.*

> [A] court's interest in administrative efficiency may not be given precedence over a party's right to due process which includes the right to cross-examine, to meet opposing evidence, and to oppose with evidence.... administrative efficiency is important, but it cannot take precedence over a party's right to due process.

[32] The following witnesses were prevented from testifying: Parametrix employee Reininger had managed the Parametrix wetland projects and would have provided essential testimony about the validity of the Parametrix report upon which the Board relied heavily. RP 568-570, ADR 1199-1202. PTI employee Bajsarowicz would have testified that PTI had urged Parametrix to prepare its wetland report during abnormally wet conditions outside of the growing season solely because PTI wanted to meet the January 15, 2007 deadline for its grading permit application with Snohomish County. RP 568-570; RP 564-570; ADR 1199-1202. Wetland consultant Ed Sewell had been on the team that evaluated conditions beneath the fill; Mr. Haggith, a farm expert would have testified about the legal agricultural practices onsite pursuant to an approved farm plan.

Glenn, 856 P.2d at 1351. Cross-examination of the state's witnesses is of paramount importance in a penalty proceeding. *United States v. Public Service Comm'n*, 422 F.Supp. 676 (1976)(limiting time to cross-examine experts impaired effective representation). The ability to cross-examine is critical, and "effective cross-examination often must necessarily be involved and lengthy." 422 F.Supp. at 680. A tribunal may not limit time for cross-examination while arbitrarily ignoring the "complexity of the subject matter" and "need of the parties to build an adequate record for judicial review." *Id. at* 680.

The Board's prehearing order, issued at the beginning of the case, limited briefing to twelve pages. The Board denied PTI's motion for leave to file an overlength brief, and struck its brief on the motion of Ecology, at the eleventh hour, refusing even to read the first twelve pages of the brief. ADR 1122. Instead, the Board ruled on the first day of the hearing that PTI should file a new, twelve-page brief the following morning if it wanted any brief to be considered at all.[33]

J. Ecology gave PTI no prior notice that it would rely on the claim that PTI was a repeat violator.

Over PTI's strenuous objection, Ecology presented testimony that PTI is a "repeat violator" because it had committed alleged wetland violations elsewhere. The Board claimed that the testimony was admissible:

[33] The Board also struck the brief's appendices, even though no pre-hearing order barred appendices and the Board had allowed Ecology to append a substantial appendix to its brief. RP 25-26, 596; 31; ADR 1153.

> I don't need argument on this. One of the established issues in this case is the reasonableness of the penalty. The history of ***the violator in this case*** is relevant and needs to be expressed.

RP 194 (emphasis added); *see also* RP 193-199, 559-560, 565-567, 221-225. When it made this ruling, the Board had not yet decided whether PTI was, in fact, a "violator", and PTI had been given no advance notice of these allegations. The Board allowed Paul Anderson to speculate in his testimony that PTI might have filled wetlands on two other sites, even though Anderson conceded that he had not been to those sites and had not examined the alleged violations. RP 221-225. But PTI had not been charged with any such violations, had not been found to have committed any such violations, and strongly objected to the testimony. The Board ruled, once again, that the testimony was relevant and admissible. RP 223.

Because Ecology had not disclosed these claims beforehand in any way, let alone including them in the Penalty Order that was supposed to set forth the basis for the penalty, PTI's counsel had not come prepared to address such claims and did not have witnesses available to counter the claims. RP 193-197. The reliability of this testimony could not even be tested by cross-examination. RP 559-560; RP 565-567. The Board allowed Ecology's witnesses to give extensive hearsay testimony about other alleged violations after PTI's allotted six hours had run out and PTI's counsel was no longer allowed to cross-examine Ecology's witnesses. The lack of notice and lack of opportunity to meaningfully

meet the testimony violated due process.[34] The Board continued throughout the hearing to refer to PTI as "the violator" – even though the hearing was still in progress. Judge Noble's reference to "the history of Pacific Topsoils, the violator" when no violation had been established betrays a prejudicial bias against PTI that was part and parcel with the total lack of evenhanded treatment in pre-hearing orders and in the conduct of the hearing. These actions violated due process.

K. The trial court should have allowed PTI to add the Snohomish County settlement agreement to the record.

Although the trial court allowed Ecology to significantly expand the record, it refused to allow PTI to expand the record to include its settlement agreement with Snohomish County showing that it paid a $37,000 penalty and removed the fill. It was important that this information be before the Court. The Board had entered numerous findings about the Snohomish County action (Findings No. 7-11; Conclusion 20) to the effect that PTI's failure to remove the fill showed recalcitrance. In fact, PTI needed a grading permit to remove the fill and could not violate the terms of the stop work order. RCW 34.05.562(1) authorized expanding the record because the settlement agreement was entered after the Board hearing. CP 374-382.

[34] Although all exhibits had to be provided several weeks in advance of the Board hearing, Ecology did not provide any exhibits which would have shown it was claiming that PTI was a past violator. The failure of notice kept PTI from submitting documents which would have shown it was not, in fact, a repeat violator.

V. CONCLUSION.

Based on the foregoing, Pacific Topsoils, Inc. respectfully requests that the Court reverse the Pollution Control Hearings Board and vacate the violation and penalty against Pacific Topsoils.

DATED this 17 day of December, 2009 at Gig Harbor, Washington.

Respectfully submitted,

Jane Ryan Koler, WSBA #13541
Attorney for Pacific Topsoils, Inc.

Court of Appeals Case No. 39691-2-II

COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

PACIFIC TOPSOILS, INC., Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondent.

CERTIFICATE OF SERVICE REGARDING

BRIEF OF APPELLANT

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ORIGINAL

I, Anita Hope, legal assistant for Jane Ryan Koler, hereby state as follows:

I am over the age of 18 years, competent to testify, and certify to the following based on my own knowledge and belief.

On the date below stated, I caused the Brief of Appellants and Certificate of Service to be sent in the manner noted to the following parties:

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[X] Via regular U.S. Mail, postage prepaid
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DATED THIS 17th day of December, 2009

Anita Hope

Anita Hope